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No. 87-670

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. GILARDY, JR., SPECIAL ADMINISTRATOR OF THE ESTATE OF DAVID LEE THOMPSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, the survivors of a service member who died incident to military service, contend that the United States is liable in damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite the rule of *Feres* v. *United States,* 340 U.S. 135 (1950).

Petitioners are the widow, parents, and administrator of the estate of Petty Officer David Lee Thompson. While on active duty as a crew member on the same Coast Guard helicopter involved in *United States* v. *Johnson,* No. 85-2039 (May 18, 1987), Thompson, along with Lieutenant Commander Johnson, was killed when, in the course of the rescue mission, the helicopter crashed. Like Johnson's survivors, petitioners brought suit under the FTCA seeking damages against the United States on the ground that the negligence of civiiian air traffic controllers employed by the Federal Aviation Administration caused the crash. The district court granted the government's motion to dismiss the complaint because Thompson's death

occurred incident to military service, so that *Feres* therefore precluded petitioners' suit (Pet. App. 1a). The court of appeals summarily affirmed in light of this Court's decision in *Johnson* (*id.* at 6a).

Petitioners, who urge this Court to grant review to consider whether *Feres* should be overruled, in effect seek rehearing of *Johnson*. There is plainly no warrant for further review by this Court. This Court reaffirmed *Feres* just last Term in *Johnson,* and petitioners suggest no "special justification" (*Arizona* v. *Rumsey,* 467 U.S. 203, 212 (1984)) demanding a departure from the doctrine of stare decisis in this case. Moreover, since "[t]he doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible' " (*Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 272-273 n.18 (1980) (plurality opinion), quoting *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)), it follows that stare decisis demands that there be a particularly strong basis for departing from a prior interpretation of a statute. Here, where the statute at issue was construed by this Court in *Feres* a few years after its enactment—and Congress has not revised the FTCA to overrule *Feres* despite the Court's acknowledgement that "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138)—there is plainly no basis for reconsideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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